THE PRESENT LEGAL STATUS OF TRUSTS.

THE term "trust," in its more confined sense, embraces only a peculiar form of business association effected by stockholders of different corporations transferring their stocks to trustees. The Standard Oil Trust was formed in this way, and originated the name "trust" as applied to industrial associations. The trustees had no powers except such as the law confers upon every holder in trust of corporate stocks; to wit, the power to receive dividends and to represent the beneficiaries at corporate meetings.

The first trust agreement to come before the courts on the direct question of legality was that of the Sugar Refiners. It differed materially from the Oil Trust in the fact that corporations were parties to the agreement, and, by virtue thereof, surrendered to the trustees some essential corporate powers. The court held that the arrangement amounted to a partnership of corporations, and the legal principle decided was that corporations could not enter into partnership, nor otherwise combine, except in the mode prescribed by statute.[1]

Upon the question whether such a combination was illegal, because in restraint of trade and opposed to public policy, the court declined to express an opinion.

The Standard Oil Trust agreement was an arrangement between individuals owning corporate stocks, and in State of Ohio *v.* Standard Oil Co.,[2] it was argued that a corporation was an entity separate from its stockholders; that an agreement between all the stockholders of a corporation, in relation to their individual property, to wit, their shares of stock, was not a corporate agreement; that stockholders had the right to assign their stocks in trust; that it was the duty of corporations to enter such transfers upon the books, and afterwards to recognize the trustees as stockholders; that such trust created neither a partnership nor a combination between corporations, nor did the corporations thereby surrender any of their powers.

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[1] People *v.* Sugar Refining Co., 121 N. Y. 582.

[2] 11 R. & C. L. J. 229.

The court held, following *dicta* in the Sugar Refiners' Case, that the idea that a corporation was a legal entity separate and apart from its stockholders was a mere fiction of law, introduced for convenience, and to be disregarded when necessary for the purpose of justice; that the agreement, having been executed by all the stockholders of the corporation, was a corporate agreement; and further, that the corporation by permitting transfers of stock to be entered upon its books, and by paying dividends to the trustees, made the agreement its own.

These decisions ended this peculiar form of organization; nevertheless it cannot yet be admitted as established law that the idea that a corporation is a legal entity separate from its stockholders is a mere fiction which the courts are at liberty to disregard when it suits their ideas of justice. The judge who pronounced this idea a mere fiction in the Sugar Refiners' Case, in a later case[1] based an important decision upon the principle that the creation of a corporation "merges in the artificial body, and drowns in it the individual rights and liabilities of the members." These principles of law can hardly be called fixed which can thus be used or disregarded at pleasure.

The term "trust," although derived as stated, has obtained a wider signification, and embraces every act, agreement, or combination of persons or capital believed to be done, made, or formed with the intent, effect, power, or tendency to monopolize business, to restrain or interfere with competitive trade, or to fix, influence, or increase the prices of commodities. Space will not permit me to touch upon the law relating to agreements in restraint of trade, nor to agreements or arrangements between persons whose capital is not united in business entered into for the sole purpose of destroying competition, controlling the markets, and increasing prices, nor to agreements between corporations exercising a public franchise. Every lawyer is familiar with a score of cases relative to such agreements and arrangements.

I am not aware of any modern cases which disturb the principles decided in Salt Co. *v.* Guthrie,[2] Arnott *v.* Coal Co.,[3] Morris Run Coal Co. *v.* Barclay Coal Co.,[4] and many similar cases, provided only it be kept in mind that these cases relate to agreements between competing companies by means of which they undertook

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[1] People *v.* Coleman, 133 N. Y. 279.
[2] 35 Ohio St. 666.
[3] 68 N. Y. 559.
[4] 68 Pa. St. 173.

to regulate each other's business, and to increase prices by artificial means.

We come face to face with a totally different legal problem, and one which has caused and is causing the utmost confusion and difficulty, when we consider that all the effects condemned by law in the cases cited may, and sometimes do, follow as incidents of a large business, whether conducted by an individual, a firm, or a corporation. The word "monopoly," not only as popularly used, but as ordinarily used in legal decisions, means only a large business. Every combination in business, whether by partnership or by corporate organization, prevents competition between the persons combined; and in proportion as the business is widely and successfully conducted, its interference with the competition of others increases. The larger the business, the greater the number of persons and the amount of capital engaged in it, the greater is the power of those who conduct it over production and prices.

The trust problem of to-day is, whether a business of magnitude, on account of these incidents, powers, or tendencies, is illegal.

The great fear of our English ancestors for some centuries was an increase of prices. The increase and debasement of the currency caused high prices, and hundreds of statutes were passed to prevent this inevitable effect. It resulted that both by statute and common law, business which then seemed of magnitude, although it would now seem of very trifling importance, as well as association for business purposes, was not only illegal, but criminal, on account of its supposed tendency to increase prices. The statute 5 & 6 Ed. 6, c. 14, made criminal forestalling, regrating, and engrossing, and all practices having an apparent tendency to increase prices, such as "making any motion by word, letter, message, or otherwise to any person for the enhancing of the price." The statute 28 Geo. 3, c. 53, declared it an unlawful combination for five or more persons to unite in covenant or partnership to purchase coals for sale; and the similar statute of 17 Geo. 3 prevented combinations by partnership or otherwise, in the purchase or sale of bricks. The statute 6 Geo. 1. c. 18, known as the Bubble Act, made it a crime, punishable with death and confiscation of goods, to form voluntary associations and to issue transferable shares; and the courts declared that the clubbing together of numbers of persons with transferable shares, for the purpose of carrying on trade, is calculated to put down individual industry and competition.[1]

[1] Pratt *v.* Hutchison, 15 East, 511.

The statutes making illegal and criminal the association of business men and of working men are numbered by hundreds, and were all based upon the same fundamental idea, that association conferred a power to increase wages or prices, and interfered with the industry of individuals. The inevitable tendency of association also was towards the crime of "engrossing," or, as it is now termed, "monopoly."

During the existence of these statutes, business was conducted on a large scale, and immense combinations were formed; but these principally existed by virtue of king's patent or parliamentary grant, and had exclusive privileges of trade. These were actual monopolies, and their evils were intensified by the laws prohibiting voluntary associations having no exclusive privileges. It is claimed that the Bubble Act, before referred to, was passed to prevent competition by voluntary associations against monopolies created by the king's patent.

In the popular mind, and in judicial opinions, no clear distinction was made between monopolies with exclusive privileges, and business associations with no exclusive privileges, and all these, as well as business of magnitude carried on by individuals, were alike condemned as "monopolies." Thus, in 11 Rep. 86, monopoly is said to exist "where one shall engross and get into his hands such merchandise, etc., as none may sell or gain them but himself." In Goodson on Patents, a monopoly is said to exist when one obtains the necessaries of life in excessive quantities. In Tomlison's Law Dictionary it is said "monopolies among the people consist of forestalling, engrossing, and regrating, which are still offences at common law."

The extent to which business might be carried on before it was held to pass the criminal line and become "engrossing" or "monopoly" was rather limited. It necessarily depended upon the idiosyncrasies of the several judges before whom cases were heard. Hence it was true in England for several centuries, and is true in the United States to-day, that a man engaged in a large business could have no assurance that he was not transgressing the criminal laws. In fact, business of any considerable magnitude was carried on in spite of legal penalties.

In the case against Waddington,[1] it appears that Waddington purchased 258 acres of growing hops out of a total acreage

[1] 1 East, 143.

of 30,000. Lord Kenyon said: "As to the objection that the quantity purchased could not constitute the offence of engrossing, there was nothing in it, and he referred to a case in which parties were convicted of conspiring to monopolize or raise the price of salt at Droitwich, and they had no doubt of its constituting an offence, although it was not pretended that these persons had intended to engross all or any considerable part of the salt in the kingdom." One Rusly was indicted and convicted for buying and selling on the same day ninety quarters of oats. Grain could not be bought in the sheaf because that had an apparent tendency to enhance the price.[1] A bond with condition not to buy sheep's trotters of any person the obligee bought of, adjudged ill, as tending to a monopoly.[2]

After the discovery of steam and machinery, association of persons and aggregation of capital for the purpose of enlarged trade became a necessity. Corporations and joint-stock associations struggled into existence, and after much opposition became legal. The bugbear of high prices as a result of the power over prices incident to large business was found to be, as Adam Smith predicted, as unsubstantial as the fear of witchcraft. Hundreds of statutes to prevent restraints of trade were swept from the statute book, with the acknowledgment that such laws had restrained trade and produced the high prices they sought to avert. Other laws were passed permitting few or many persons, at will, to organize joint-stock associations for all legal purposes, and to issue transferable shares. This was a complete reversal of "public policy." Courts in England were slow to recognize this revolution, and until comparatively recent days we find little change in the language of the judges. In case after case, it is asserted that whatever destroys or even relaxes competition, or interferes with the trade of individuals, or confers a power over production or prices, or tends to monopoly, is contrary to public policy. And yet every joint-stock association created under the law, to some extent destroyed and relaxed competition, interfered with the trade of individuals, conferred a power over production and prices, and not only tended to monopoly, but was a monopoly, in the ordinary sense of that word.

In this confused, contradictory, and uncertain condition, the law of England continued until the decision of the highest courts and

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[1] 3 Inst. 197.

[2] Comb. 121.

the House of Lords in the case of Mogul Steamship Co. *v.* McGregor.[1] In this case it is said that "it is perfectly legitimate to combine capital for all the mere purposes of trade, for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital when used for purposes of competition in the manner proposed by the argument of the plaintiffs would in the present day be impossible, — would only be another method of attempting to set boundaries to the tides." It is pointed out that combination is only another method of competition, and the broad ground is stated "that the policy of our law as at present declared by the Legislature is against all fetters on combination and competition unaccompanied by violence or fraud or other like iniquitous acts. The repeal of the ancient common law and the statutes against engrossing, etc., with the confession that they had discouraged trade and enhanced prices, is referred to as amounting to a "confession of failure in the past, the indication of a new policy for the future." "Thus," continues Fry, L. J., "the stream of modern legislation runs strongly in favor of allowing great combinations of persons interested in trade, and intended to govern or regulate the proceedings of large bodies of men, and thus necessarily to interfere with what would have been the course of traffic if unaffected by such combinations. I therefore conclude that the combination in the present case cannot be held illegal as opposed to the policy of the law."

This case has settled the law of England. In this country, nothing is settled. The law is a chaos of contraction and confusion, and recent statutes have succeeded in making confusion worse confounded. Associations in this land have in number and magnitude surpassed those of any other country. All important business is conducted by corporations, associations, or partnerships. The people of the various States have recognized the benefits of combination, and by amendments of the State constitutions have forced the Legislatures in a majority of the States to cease granting charters with exclusive privileges to favorites, and to grant the benefits of corporate organization equally to all. In the largest number of the States, three or more persons may organize for any legal business by filing a paper, and no limit is placed upon the number of persons who may thus associate, or the amount of capital they may employ.

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[1] 21 Q. B. Div. 554; 23 Q. B. Div. 598.

Such legislation is undoubtedly declarative of public policy, and is utterly at variance with the public policy formerly asserted by the common law. But judges and law writers differ widely in their desire or ability to recognize this change of policy. By one American writer it is claimed that the common law against engrossing, regrating, etc., has borne the test of ages, and has been wise and useful, and he laments that the laws are not executed in the United States.[1] By a later author it is claimed that, notwithstanding the statutes and common law against engrossing have been repealed in England, they are still common law in this country,[2] and many judges continue to repeat the principles of the common law to the effect that whatever interferes with competition or tends to monopoly (*i. e.*, to a large business), or tends to interfere with individuals in trade, is in restraint of trade and contrary to public policy, forgetful of the fact that under such rulings a partnership or corporation could not exist.

A score of cases, however, recognize the fact that public policy has changed; that "the rules of the common law in relation to restraint of trade are considerably modified;"[3] "that so far from association restraining trade, it is the most effective instrument of trade; that while associates may not compete among themselves, association stimulates to competition;"[4] that "a party may legally purchase the trade and business of another for the very purpose of preventing competition;"[5] that "anti-competitive contracts to avert personal ruin may be perfectly reasonable;"[6] "that co-operation, though it lessens competition, is not forbidden by public policy."[7]

Leaving this chaos of common law for the present, let us devote our attention to the statutes adopted to regulate trusts, and to the decisions in relation to them.

These statutes bristle with so many difficulties, and are believed to be in so many points contrary to provisions both of their respective State constitutions and of the Federal Constitution, that as yet they have proved of but little effect, and the Populists of the Western and Southwestern States are loudly calling for more effective legislation.

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[1] 7 Dane's Ab. 39.
[2] 1 Bishop on Crim. Law, sec. 524.
[3] Gibbs *v.* Gas Co., 130 U. S. 396.
[4] Atcheson *v.* Mullin, 43 N. Y. 473.
[5] Hornes *v.* Greeves, 7 Bing. 735.
[6] Diamond Match Co. *v.* Roeber, 106 N. Y. 473.
[7] Com. *v.* Carlisle, 1 Brightly.

Anti-trust laws have been enacted in about twenty States and Territories of the Union. They are all penal laws, and create some new and astonishing crimes. Omitting all tautology, and premising that I use only the word "persons," while the statutes specify also corporations, associations, and partnerships, and that I use the word "agreement" or "attempt," while the statutes specify every possible contract, combination, conspiracy, understanding, arrangement, or act, the enactments may be epitomized as follows: —

In sixteen States it is a criminal conspiracy for two or more persons to agree to regulate or fix the price of any article, or to fix or limit the quantity of any article to be manufactured, mined, produced, or sold. Regulating and fixing prices necessarily include, increasing and reducing prices, but in most of the statutes these are also specified as criminal.

In six States it is a crime for two or more persons to enter into any agreement whereby "full and free competition in production and sale" is prevented.

In two States and one Territory it is a crime for two or more persons to "attempt to monopolize" any article.

In Nebraska, two or more persons are guilty of conspiracy if they agree to suspend or cease the sale of any manufactured products, or by agreeing that the profits of any manufacture or sale shall be made a common fund to be divided among them.

In Texas and Mississippi, besides the crimes of fixing, regulating, increasing, and reducing prices, it is also a crime for persons to settle the price of any article between themselves or between themselves and others.

In New York, it is a crime to enter into any contract whereby competition in the supply or price of articles in common use for support of life and health may be restrained or prevented for the purpose of advancing prices.

It is possible that a construction can be put upon these statutes which will render them compatible with ordinary transactions of bargain and sale, and with the existence of partnerships, corporations, and other business combinations. If so, they will thereby at the same time be made constitutional and harmless.

The prominent defect in all these enactments is, that under any literal construction, they, like the repealed English statutes I have referred to, render business, and particularly business by association, impossible. The evils which the Legislatures supposed to exist solely in trusts or large combinations, exist likewise in the

smallest combination or partnership, the difference being only in degree. How can a partnership exist if it is a criminal conspiracy for two persons to agree to regulate, fix, increase, or decrease the price, or to fix or limit the quantity, of any article they manufacture, produce, or sell, or to agree to suspend or cease the sale or manufacture of any article? Then, too, is not every partnership a restriction of "full and free competition," and does not the village baker, who attempts to do all the business of his little burgh, "attempt to monopolize" the business?

The Federal anti-trust law makes criminal every contract, combination, or conspiracy in restraint of trade or commerce among the States or with foreign nations, and likewise every attempt or combination to monopolize any part of said trade or commerce.

The difficulties of this law are apparent at first sight. First, what is the meaning of the term "restraint of trade," as used in this Act? Does it embrace partial as well as total restraint of trade? Has it its ancient common law meaning, or are the courts at liberty to inquire, without regard to old opinions, what acts or agreements are actually in restraint of trade as it is now carried on through the instrumentality of association? Second, what is the meaning of "monopolize"? Does it mean an exclusive privilege of trade, or does it mean, as more ordinarily used, engrossing, or doing a large business? If the latter, how large must the business be before it can be called monopoly, and is not every effort made to enlarge business an "attempt to monopolize?"

If some of the modern opinions of judges in trust cases are to be followed, we are relegated at once, by the statutes referred to, to the dark ages, when business was necessarily carried on in defiance of law. For instance, in the Sugar Trust Case, in General Term,[1] the court, by Judge Daniels, reasserted the old doctrines of the common law to their fullest extent. The combination was held to be illegal for the reasons, among others, that "it was intended to bring about and secure ulterior advantages in the way of advanced profits to the associates." Its affairs "were to be so managed and carried on as to promote the profit and gain of the associates," and "it is no more than just to infer that the control is to be used to avoid competition and enhance prices, and in that manner, as it is the ordinary expedient to that end, promote the interests and profits of the associates." This is a repetition of the

[1] 6 R. & C. 1. J. 142.

mistake of centuries ago, that business men may not adopt methods which promote their interests and profits, because their desire for profit may cause them to use those methods improperly, and because their advantages may tend to the disadvantage of others. There are four centuries of experience and wisdom between that idea and the language of the judges in Mogul S. S. Co. *v.* McGregor, to wit, that "the instinct of self-advancement and self-protection is the very incentive to all trade;" that "to say that a man is to trade fairly, but that he is to stop short at any act which is calculated to harm other tradesmen, would be a strange and impossible counsel of perfection;" that "it is perfectly legitimate to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade;" that "to limit combination of capital when used for purposes of competition, would be only another method of attempting to set boundaries to the tides;" that "the object of acquisition of gain is lawful and commendable;" and that as "competition exists when two or more persons seek to possess or to enjoy the same thing, it follows that the success of one must be the failure of another."

The highest court in Michigan[1] took occasion to condemn as illegal a corporation of the State of Connecticut, although the corporation was not before it as a party, and the question of its legality apparently had no pertinency to the question at issue, and was not argued. No fact concerning the corporation was before the court, except that it had a large capital and had purchased competing concerns. Sherwood, C. J., said that its capital would enable it to buy up and absorb all the match business of the United States and Canada, thereby preventing all competition. He denounced the corporation as an artificial person governed by a single motive or purpose, which is to accumulate money, and deemed it doubtful if free government can long exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations. The fact seems to have been before the court that the price of matches had been reduced. Champlin, J., thought this fact of no importance, because the company had it in its power to raise the price at any time to an exorbitant degree.

The Supreme Court of Nebraska[2] followed these views, and held to the old common law principle that whatever tends to destroy competition and to create a monopoly is illegal and void.

[1] Richardson *v.* Buhl, 7 R. & C. L. J. 89.

[2] Nebraska *v.* Distilling Co., 8 R. & C. L. J. 323.

The same ideas governed in State of Ohio *v.* Standard Oil Co.[1] The court, by Minshal, J., was of opinion that the purpose of the agreement was to form a virtual monopoly, and of so controlling the production and price of petroleum and its products as to destroy competition. "It may be true that it has improved the quality and cheapened the cost of petroleum and its products to the consumer. But such is not one of the usual and general results of a monopoly; and it is the policy of the law to regard not what may, but what usually happens."

I do not agree with the statement that cheapening of price "is not one of the usual and general results of a monopoly." Taking monopoly in the sense here used, — to wit, a large business, — the industrial history of the last four centuries effectually proves the contrary to be the fact.

But the Ohio court goes further, and boldly proclaims large industries to be contrary to the policy of the law. "A society in which a few men are the employers and the great body are merely employees or servants, is not the most desirable in a republic, and it should be as much the policy of the law to multiply the numbers engaged in independent pursuits or in the profits of production, as to cheapen the price to the consumer."

The cases which have arisen in the United States courts under the Federal statute have not, with possibly a single exception, adopted these views of the State courts. The exception is the case of American Biscuit Co. *v.* Klotz,[2] in the Circuit Court, E. D., of Louisiana, in which it was held that the purchase by the Biscuit Co. of thirty-five subordinate factories was an attempt to monopolize the business.

The most important cases which have arisen under the Federal statute arose out of indictments against officers of the so-called Whiskey Trust.[3] These indictments set forth that the defendants had purchased seventy distilleries and manufactured seventy-five per cent of the distillery products of the United States, and that thereby the company was able to control and fix the quantity and price of such products, and to prevent free competition therein, and that they attempted to monopolize the trade by means of rebates to consumers. "If these acts," says Judge Ricks, "are illegal and in restraint of trade, and they constitute a monopoly under

[1] 10 R. & C. L. J. 229.

[2] 9 R. & C. L. J. 9.

[3] United States *v.* Greenhut, N. D. Ohio, 51 Fed. Rep. 205; *In re* Terrell, E. D. New York, 51 Fed. Rep. 213; *In re* Greene, S. D. Ohio, 52 Fed. Rep. 104.

this Act, it may well be denominated an Act to restrain legitimate enterprise, and limit and qualify the ownership in property." Congress "did not intend to limit the amount of capital a citizen should invest in any line of business, or restrain his energy or enterprise in acquiring for himself all the trade possible in such business, provided in so doing he did not by illegal contracts or devices restrain others from pursuing the same business, or deprive the public from enjoying the advantages of the free use of capital, skill, and experience of competitors."

Judge Lacombe, *In re* Terrell, concurs in the views of Judge Ricks. So also did Judge Jackson, now of the United States Supreme Court. After stating, *In re* Greene, that it is not clear what Congress meant by "attempt to monopolize," the learned judge says: "It is very certain that Congress could not, and did not, by this enactment, attempt to prescribe limits to the acquisition, either by private citizen or State corporation, of property which might become the subject of interstate commerce, or declare that, when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the States, a criminal offence was committed by such owner or owners." He proceeds to show that persons monopolize business in the popular sense just in proportion as the owner's business is increased, enlarged, and developed; but holds that neither the magnitude of business, nor the incidental powers thereby acquired, nor the purpose of regulating prices and controlling traffic, constitutes the monopoly which the statute condemns, but that the monopoly condemned embraces the elements of an exclusive privilege on the one side, and a restriction or restraint on the other which operates to prevent the exercise of some right or liberty. Upon the question of restraint of trade, the learned judge adopts the principles laid down in the decision in the case of Mogul S. S. Co. *v.* McGregor.

Other important cases have arisen under the Federal Act. In United States *v.* Nelson, D. C., Minnesota,[1] an indictment against a number of lumber dealers to advance prices, Nelson, J., said: "An agreement between a number of dealers and manufacturers to raise prices, unless they practically controlled the entire commodity, cannot operate a restraint upon trade, nor does it tend to injuriously affect the public. Unless the agreement involves an

[1] 52 Fed. Rep. 567.

absorption of the entire traffic in lumber, and is entered into for the purpose of obtaining the entire control of it, it is not objectionable to the statute, in my opinion. Competition is not stifled by such an agreement."

Risner, J.,[1] in an indictment under this statute, said: "When contracts go to the extent only of preventing unhealthy competition, and yet at the same time furnish the public with adequate facilities at fixed and reasonable prices, and are made only for the purpose of averting personal ruin, the contract is lawful." In this case, also, monopoly was defined, adopting the language of Judge Christiancy,[2] as "an exclusive right granted to a few of something which was before a common right."

Putnam, J., in United States *v.* Patterson,[3] says: "A contract, combination, or conspiracy in restraint of trade may be not only not illegal, but praiseworthy; as where parties attempt to engross the market by furnishing the best goods or the cheapest."

Space will not permit reference to any others of the numerous cases which have arisen under these statutes, nor is it important, since none of the decisions are final. The Acts of the various States, as well as the Act of Congress, must eventually and finally be passed upon by the Supreme Court of the United States, important questions arising under the Federal Constitution being involved in all the so-called anti-trust legislation. No questions of more moment to the business world are likely to come before that tribunal, and until they are settled, business men must continue their endeavors to enlarge and extend their business under the shadow of criminal indictment. If popular views are adopted in the construction of these statutes, and if they are held to be constitutional, they have, in the language of Judge Coxe, in a late case,[4] "made unlawful almost every combination by which trade and commerce seek to extend their influence and enlarge their profits," as well as "all agreements by which honest enterprise attempts to protect itself against ruinous and dishonest competition." Still more, they have made criminal all business of magnitude and all business conducted by means of association of persons and aggregation of capital. I have too much faith in our constitutions and our courts to believe such a result possible. *S. C. T. Dodd.*

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[1] United States *v.* Trans. Miss. Freight Ass'n, 53 Fed. Rep. 440.

[2] Beal *v.* Chase, 31 Mich. 521.

[3] 55 Fed. Rep. 605.

[4] Dueber Watch &c. Co. *v.* Howard Watch Co., 55 Fed. Rep. 851.